Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term 2000

L.T. BRANT,
Petitioner,
v.
EARLE LILLY, PIRE & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLAGE of MEDICINE, EARNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDE LOHNER, ANN M. HODGES AND JOEL A. NASS,
Respondent.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDICES F-G-H-I

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APPENDIX F

NO. 90-53676

Mark Metzger, Plaintiff,	§	IN THE DISTRICT
	§	COURT OF
	§	
V.	§	HARRIS COUNTY,
	§	TEXAS
	§	
JUDY METZGER, et al., Defendants.	§	269TH JUDICIAL
	§	DISTRICT

SHOW CAUSE ORDER

WHEREAS L. T. Bradt was attorney for the plaintiff during trial of Cause No. 90-53676 in the 269th District Court, Harris County, Texas, styled Mark Metzger v. Judy Metzger, et al., and

WHEREAS, on April 2, 1992, the Court granted item number XVI in the Defendants' Joint Motion in Limine filed in that cause, and thereby ordered that counsel for the plaintiff and his witnesses refrain "from mentioning or offering any evidence or testimony that plaintiff has offered to, taken or passed a lie detector test," without first obtaining a ruling "by the Court as to the competency of each matter outside of the presence and hearing of any members of the Jury or Jury Panel"; and the Court also thereby ordered that counsel for the plaintiff "apprise each of plaintiff's witnesses of the contents" of the joint motion in limine, "to the end that such Motion not be inadvertently violated by a witness," and

WHEREAS L. T. Bradt thereafter violated the order in limine during voir dire examination of the jury and his opening

statement, by making reference to the plaintiff having submitted to a polygraph or "lie detector" test, and was admonished by the Court with regard to that violation of the Court's order; and

Count One.

WHEREAS L. T. Bradt intentionally, knowingly and recklessly violated said order during his examination of witness Marie Munier on April 10, 1992, by eliciting testimony from her in the presence of the jury concerning a polygraph test administered to the plaintiff, when he knew and should have known that his question to said witness was calculated to elicit such testimony, and after he failed to apprise said witness of the Court's order in limine pertaining to testimony regarding a polygraph examination; and

WHEREAS said violation of the Court's order in limine obstructed the orderly progress of the trial, and obstructed the Court in the administration of justice; and

Count Two

WHEREAS L. T. Bradt thereafter intentionally and knowingly violated the above-described order in limine during his examination of witness Marie Munier on April 10, 1992, by writing the words "negative polygraph" on a large pad of paper in the courtroom, in full view of the jury, and

WHEREAS said violation of the Court's order in limine obstructed the orderly progress of the trial, and obstructed the Court in the administration of justice; and

Count Three.

WHEREAS L. T. Bradt thereafter intentionally and knowingly violated the above-described order in limine during

his examination of witness Marie Munier on April 10, 1992, by referring again in the presence of the jury to a polygraph examination, in a subsequent question addressed to that witness, and

WHEREAS said violation of the Court's order in limine obstructed the orderly progress of the trial, and obstructed the Court in the administration of justice; and

WHEREAS the Court therefore adjudged L. T. Bradt to be guilty of a contempt of court, on account of the foregoing violations of the Court's order in limine, and assessed his punishment at confinement in the Harris County Jail for thirty days and payment of a $500 fine; and

WHEREAS L. T. Bradt, as an attorney and officer of the court, moved for a determination of his guilt or innocence of contempt of court by a judge of a court that is not the offended court, pursuant to § 21.002(d), Texas Government Code;

NOW, THEREFORE, it is ordered by this Court that the said L. T. Bradt show cause why he should not be adjudged guilty of contempt of court as alleged in each of the three foregoing counts of contempt of court, and punished therefore, and he shall do so by appearing before such judge as may be designated by the presiding judge of the administrative judicial region, in the courtroom of the 269th District Court, Harris County, Texas, on September 15, 1992, at 9:00 A.M./P.M., for a hearing to show facts, if any exist, that deny or excuse said contempt.

And it is further ORDERED that the clerk of this Court shall issue notice to show cause, commanding the said L. T. Bradt to appear and show cause in the manner and at the time specified in this order, why he should not be held in contempt of the 269th District Court, Harris County, Texas, and punished

therefore; and a copy of this order shall accompany said notice, and the Clerk shall issue appropriate citation for the service of said notice.

Signed this 18 day of Aug, 1992.

/s/ David West

JUDGE PRESIDING
269th District Court
Harris County, Texas

APPENDIX G
90-53676

MARK METZGER	§	IN THE DISTRICT
Plaintiff	§	COURT OF
VS.	§	
	§	
JUDY SEBEK, EARLE LILLY	§	
PIRO & LILLY, P.C.,	§	HARRIS COUNTY,
DEPELCHINE CHILDREN'S	§	TEXAS
CENTER, BAYLOR COLLEGE	§	
OF MEDICINE, ERNEST	§	
KENDRICK, MICHAEL D.	§	
COX, JEAN GUEZ, BARBARA	§	
TAYLOR, LUISA MARIA	§	
ACEVEDO LOHNER, ANN M.	§	
HODGES and JOEL A. NASS	§	269TH JUDICIAL
Defendants	§	DISTRICT

The record reveals that the above styled and numbered cause was called for trial on March 32, 1992 and there after proceeded in trial until May 15, 1992.

Prior to commencing voir dire, and the selection of the jury, an examination of the exhibits proposed by the parties, to be offered for admission in evidence, were marked. Some of them were ruled upon by the Court for admission into evidence without objection. One such exhibit was Baylor Exhibit No. 1 which contained a copy of the polygraph test made the basis of this contempt proceeding. This exhibit was admitted into evidence for all purposes, by the Court, without objection.

The evidence shows that a pleading styled "Defendants' Joint Motion in Limine" was filed on March

30, 1992 containing XXXIII matters including a paragraph numbered XVI G. That paragraph referenced the results of a lie detector test and requested that it be excluded from the trial of the case.

The evidence also shows an exhibit styled "Order On Defendants' Joint Motion In Limine" signed by Judge West on April 2, 1992 reflecting "XVI GRANTED ____."

The trial, with the jury seated, commenced and thereafter on April 10, 1992 the Respondent, L. T. Bradt, elicited testimony from witness Marie Munier with reference to the polygraph test and also wrote a reference to the results of that test on a poster in view of the jury.

On April 23, 1992, counsel who offered, and had admitted into evidence without objection, Baylor exhibit No. 1 moved the Court to withdraw from that exhibit the pages reflecting the result of the polygraph test in question.

A judgment was signed on the 21st day of May, 1992.

The Respondent, L. T. Bradt, filed a motion for new trial. Thereafter, he filed a motion requesting that Judge David West recuse himself.

On July 1, 1992 Judge West, in a signed order, declined to recuse himself and requested the Presiding Judge of the 2nd Administrative Judicial Region of Texas to assign another judge to hear the motion for recusal.

On August 18, 1992 Judge West signed an order reflecting the Respondent, L. T. Bradt, guilty of contempt and assessed punishment as a $500.00 fine and 30 days confinement in the Harris County jail.

Respondent, L. T. Bradt, then moved for the determination of guilt or innocence of the contempt of court by a judge other than the offended court in accordance with Section 21.002 of the Texas Government Code.

On September 15, 1992 Judge Thomas J. Stovall, Jr., the Presiding Judge of the 2nd Administrative Judicial Region of Texas assigned Arthur C. Lesher, Jr., a Senior District Judge, to determine the guilt or innocence of Respondent, L. T. Bradt.

Thereafter, on November 30, 1992 came on for hearing the matter assigned to Arthur C. Lesher, Jr. All parties were present and announced ready.

The State's attorney announced to the Court that the State of Texas was abandoning the allegations contained on page one of the Show Cause Order signed on August 18, 1992, to wit,

> "WHEREAS L. T. Bradt thereafter violated the order in limine during voir dire examination of the jury and his opening statement, by making reference to the plaintiff having submitted to a polygraph or 'lie detector' test ...."

After hearing and examining the evidence introduced, the Court is of the opinion that the Respondent, L. T. Bradt, is entitled to a dismissal of the contempt charges made against him, and it is so ordered.

Signed this 4th day of December, 1992.

s/
ARTHUR C. LESHER, JR.
SENIOR DISTRICT JUDGE PRESIDING

APPENDIX H

VERNON'S TEXAS RULES ANNOTATED
TEXAS RULES OF CIVIL PROCEDURE
PART I. GENERAL RULES

Rule 13. Effect of Signing of Pleadings, Motions and Other Papers; Sanctions

The signature of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanctions available under Rule 215-2b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

1. Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a. Appropriate Court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

b. motion.

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200-2b, 201-4 or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the office who is to take his deposition, after being served with a proper notice;

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apple to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessary of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

c. Evasive or Incomplete Answer. For purposes of this subdivision an evasive r incomplete answer is to be treated as a failure to answer.

d. Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after

opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

e. Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are

reasonable in relation to the amount of work reasonably expended in obtaining the order.

2. Failure to Comply with Order or with Discovery Request.

a. Sanctions by Court in District Where Deposition is Taken. If a dependent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. Sanctions by Court in Which Action if Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(7) When a party has failed to comply with an order under Rule 167(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

c. *Sanction Against Nonparty for Violation of Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

3. **Abuse of Discovery Process in Seeking, Making, or Resisting Discovery**. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply with Rule 169.

(a) Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any

matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

6. Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

TEXAS CIVIL PRACTICE AND REMEDIES CODE

§ 9.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervenor, seeking recovery of damages. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(3) "Groundless" means:

(A) no basis in fact; or

(B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(4) "Pleading" includes a motion.

§ 9.002. Applicability

(a) This chapter applies to an action in which a claimant seeks:

(1) damages for personal injury, property damage, or death, regardless of the legal theories or statutes on the basis of which recovery is sought, including an

action based on intentional conduct, negligence, strict tort liability, products liability (whether strict or otherwise), or breach of warranty; or

(2) damages other than for personal injury, property damage, or death resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought, including libel, slander, or tortious interference with a contract or other business relation.

(b) This chapter applies o any party who is a claimant or defendant, including but not limited to:

(1) a county;
(2) municipality:
(3) a public school district;
(4) a public junior college district;
(5) a charitable organization;
(6) a nonprofit organization;
(7) a hospital authority;
(8) a hospital authority;
(9) any other political subdivision of the state; and
(10) the State of Texas.

(c) In and action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

§ 9.003. Texas Rules of Civil Procedure

This chapter does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

§ 9.004. Applicability

This chapter does not apply to the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or to Chapter 21, Insurance Code.

SUBCHAPTER B. SIGNING OF PLEADINGS

§ 9.011. SIGNING OF PLEADINGS

The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:

(1) groundless and brought in bad faith;
(2) groundless and brought for the purpose of harassment; or
(3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

§ 9.012. Violation; Sanction

(a) At the trial of the action or at any hearing inquiring into the facts and law of the action, after reasonable notice to the parties, the court may on its own motion, or shall on the motion of any party to the action, determine if a pleading has been signed in violation of any one of the standards prescribed by Section 9.011.

(b) In making its determination of whether a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall take into account:

(1) the multiplicity of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the party to investigate and conduct discovery; and

(4) affidavits, depositions, and any other relevant matter

(c) If the court determines that a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall, not earlier than 90 days after the date of the determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an appropriate sanction on the signatory, a represented party, or both.

(d) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if, before the 90th day after the court makes a determination under Subsection (a), the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading.

(e) The sanction may include one or more of the following:

(1) the striking of a pleading or the offending portion thereof;
(2) the dismissal of a party; or
(3) an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable

expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.

(f) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if the court has, with respect to the same subject matter, imposed sanctions on the party who stands in opposition to the offending pleading under the Texas Rules of Civil Procedure.

(g) All determinations and orders pursuant to this chapter are solely for purposes of this chapter and shall not be the basis of any liability, sanction, or grievance other than as expressly provided in this chapter.

§ 10.001 CIVIL PRACTICE & REMEDIES CODE
Title 2

§ 10.001. Signing of Pleadings and Motions

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry;

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Added by Acts 1995, 74th Leg., ch. 137, § 1, eff. Sept. 1, 1995.

Section 2 of the 1995 Act provides:

"This Act takes effect September 1, 1995, and applies only to a pleading or motion in a suit commenced on or after that date. A pleading or motion in a suit commenced before the effective date of this Act is governed by the law applicable to the pleading or motion immediately before the effective date of this Act, and that law is continued in effect for that purpose.

§ 10.004. Violation; Sanction

(a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by other similarly situated.

(c) a sanction may include any of the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this chapter.

Added by Acts 1995, 74th Leg., ch. 137, § eff. Sept. 1, 1995.

GOVERNMENT CODE

CHAPTER 21. GENERAL PROVISIONS

§ 21.001. Inherent Power and Duty of Courts.

(a) A Court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction.

(b) A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done.

(c) During a court proceeding a judge may not request that a person remove an item of religious apparel unless:

(1) A party in the proceeding objects to the wearing of the apparel; and

(2) the judge concludes that the wearing of the apparel will interfere with:

(A) the objecting party's right to a fair hearing; or

(B) the proper administration of justice; and

(3) no reasonable alternative exists under which the judge may:

(A) assure a fair hearing; and

(B) protect the fair administration of justice.

GOVERNMENT CODE

§ 21.002. Contempt of Court.

(a) Except as provided by Subsections (g) and (h), a court may punish for contempt.

(b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than $500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

(c) The punishment for contempt of a justice court or municipal court is a fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.

(d) An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. The presiding judge of the administrative judicial region in which the alleged contempt occurred shall assign a judge who is subject to assignment by the presiding judge other than the judge of the offended court to determine the guilt or innocence of the officer of the court.

(e) This section does not affect a court's power to confine a contemner to compel him to obey a court order.

(f) Article 42.033, Code of Criminal Procedure, and Chapter 157, Family Code, apply when a person is punished by confinement for contempt of court for disobedience of a court order to make periodic payments for the support of a child.

(g) A court may not punish by contempt an employee or an agency or institution of this state for failure to initiate any

program or to perform a statutory and adequately funded the program:

(1) if the legislature has not specifically and adequately funded the program; or

(2) until a reasonable time has passed to allow implementation of a program specifically and adequately funded by the legislature.

(h) A justice or municipal court may not punish by contempt a person who engages in conduct that violates an order of the court if the conduct of the person is delinquent conduct under Section 51.03(a)

(3), Family Code. The justice or municipal court shall refer the person to the juvenile court for engaging in the delinquent conduct.

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

The Texas Attorney General's
Medicaid Fraud Control Unit
1101 Camino LaCosta, Ste. 257
Austin, Texas 78751-3930
(512) 463-2011

INVESTIGATIVE REPORT FOR PROSECUTION ANALYSIS

Investigation of : Shamal Beltangady, M.D.
88 Hunter Ridge Drive
Glastonbury, Connecticut
Texas Medicaid Provider Number:
P08876263
(DePelchin Faith Home: Z000PM923)

MFCU Case Number: P-0387-499

1. INTRODUCTION

This case originated as a result of information from the Texas Department of Human Services (TDHS) and the National Heritage Insurance Company (NHIC) being forwarded to the Special Operations Section (SOS) of the Texas Attorney General's Medicaid Fraud Control Unit (MFCU) (Exhibit 1).

This report contains the findings of the investigation of Shamal Beltangady, M.D. Dr. Beltangady is a licensed physician specializing in the field of psychiatry, who now lives at 88 Hunter Ridge Drive in Glastonbury, Connecticut. Currently Dr. Beltangady is employed as a staff psychiatrist by the Institute of Living. 400 Washington, Hartford, Connecticut (Exhibit 2). Dr.

Beltangady is licensed in both Texas and Connecticut. Dr. Beltangady is of East Indian descent, born June 8, 1947, height 5 feet 3 inches with brown hair and brown eyes. She has no known criminal history.

Information obtained while conducting the field investigation at DePelchin Faith Home in Houston, Texas indicated the involvement of three individuals in a third party billing scheme which utilized Dr. Beltangady's Medicaid provider number without her knowledge. These individuals, employed by DePelchin Children's Center, are listed as follows:

1. Larry G. Cash, Business Director
2. Robert S. McKelvey, M.D., Medical Director
3. Robert E. Barker, Executive Director

DePelchin Children's Center is a Texas nonprofit which owns and operated the DePelchin Faith Home.

II. STATUTES/REGULATIONS VIOLATED OR CONSIDERED

TX P.C. § 37.10	Tampering With A Governmental Record
TX P.C. § 32.46:	Securing Execution of Document By Deception
TX P.C. § 31.03:	Theft
40 T.A.C. 29.1:	Claim Information Requirements
40 T.A.C. 29.501:	Additional Claim Information
40 T.A.C. 29.502	Authorized Physician Services
40 T.A.C. 1396(h)	Medicaid Fraud

III. INVESTIGATIVE METHODOLOGY AND RESULTS

Utilizing the Purchased Health Services Investigative Guideline and the Provider Payment History (MQ 510), a sample of forty-eight recipients who had been reported as having received services from D.r Beltangady was selected (Exhibit 3). Recipient histories (HRBR 423s) were ordered.

Upon receipt and examination of the recipient histories, a striking similarity was noted among most of the billed procedures. The majority of the recipients were seen as inpatient, but there were no billings by any hospital. It was further determined that all recipients were seen routinely each thirty-day period, every Monday, Wednesday, and Thursday. All of the recipients received exactly the same treatment on each day regardless of the recipient's diagnosis.

Sixty-five claims were examined and it was noted that each of the claims during a particular calendar month were identical. In fact, the explanation of services attached to each of the claims for a particular month was an identical photocopy (Exhibit 4).

While examining recipient histories another peculiarity was noted. On the first sample, the run dates were September 1, 1983 through September 22, 1987. However, none of the recipient histories contained any service date listed past November 28, 1986. It is believed that DePelchin's Medicaid billings stopped as a result of the "spell of illness" regulation which became effective September 1, 1986.

In October 1986 a bulletin was released by NHIC and distributed to Medicaid providers which outlined "spell of illness". A Title XIX "spell of illness" is a continuous period of hospital confinement. Successive periods of confinement are considered to be continuous unless the last date of discharge from any hospital and the next date of readmission to any hospital are separated by at least sixty consecutive days.

Medicaid will cover only services for thirty days of an impatient hospital stay per spell of illness. (Each spell of illness must be separated by at least sixty consecutive days between the date of discharge and the date of readmission.) After eligibility requirements are met, the recipient may receive benefits for hospital services furnished to them during each Title XIX spell of illness.

The Texas State Board of Medical Examiners was contacted to determine whether Dr. Beltangady's medical license was listed as active. It was determined to be active, and that it would remain so until May 31, 1988 (Exhibit 5).

On September 22, 1987 I called DePelchin Children's Center in Houston, Texas, (713) 861-8136, and asked to speak with Dr. Shamal Beltangady. I was informed that Dr. Beltangady had not been affiliated with DePelchin Children's Center since August 1984.

The Secretary of State's Office was contacted and the Articles of Incorporation for DePelchin Children's

Center were obtained, including amendments and lists of officers and board members (Exhibit 6).

An NHIC Mnemonic Inquiry was obtained utilizing the group provider number (Z000PM923) that was being used on all claims submitted to NHIC by DePelchin Children's Center. The names listed on the inquiry were Dr. Shamal Beltangady, Dr. Barbara J. Felkins, Dr. Theresa Blackburn, and Dr. Walter Schmalsteig. NHIC was contacted and Provider Enrollment. Applications were obtained for all of the doctors named (Exhibit 7).

Dr. Beltangady was employed at DePelchin Children's Center from July 1981 until August 31, 1984. Dr. Barbara Felkins was employed at DePelchin Children's Center from February 1, 1982 until August, 1985. Dr. Theresa Blackburn was employed at DePelchin Children's Center from August 12, 1981 until December 15, 1981. Dr. Walter Schmalsteig was employed at DePelchin Children's Center from October 1, 1983 until December 31, 1986. Although each of these physicians had a Medicaid provider number and were part of the group (Z000PM923), they did not provide the services for which Medicaid was billed.

On March 31, 1988 I obtained a second set of recipient histories with run dates from September 1, 1983 through March 30, 1988. While examining histories of thirty-two recipients for December 1987, it was found that every one of them received exactly the same services, and the amount billed for each was exactly identical. Again, copies of the claims were obtained, and it was determined that attachments to each claim for the entire month were merely photocopies of a list of services and dates showing Dr. Beltangady's provider number as being the rendering physician (Exhibit 8).

The Texas Department of Mental Health and Mental Retardation (TDMHMR) was contacted with a request

for all documents that had been filed by DePelchin Children's Center regarding its application for a state license to operate a private mental hospital (Exhibit 9).

On April 5, 1988 Investigator Charles Hafer and I went to Houston to conduct a field investigation. Upon arrival Charles Hafer and I went to DePelchin Children's Center where we met with Susan Blair, the current administrator. Ms. Blair was not familiar with nor involved in the Medicaid billing procedures. She had very little information for us. We advised Ms. Blair that we would need to look at numerous medical records. She did agree to provide them for our review (Exhibit 10).

Investigator Hafer and I then met with Robert E. Barker, the chief executive officer of DePelchin Children's Center. Mr. Barker could not explain why DePelchin Children's Center billed Medicaid and received $16,095.51 for services listed as having been provided by Dr. Beltangady during December 1987, when Dr. Beltangady had not been a physician at the center since August 1984. Mr. Barker advised us of a formula, which he stated was unknown to him, that was utilized by Mr. Larry Cash when submitting claims to NHIC for payment. (Exhibit 11). At this point, Mr. Barker asked whether he should confer with legal counsel before answering any other questions. We were unable to obtain any further specific information.

On April 6, 1988 at about 9:30 a.m. Investigator Hafer and I met with the executives of the DePelchin Children's Center. Those present at the meeting were Robert Barker, Susan Blair, Martha Mayberry, Dr. Robert McKelvey, Larry Cash and corporate attorney, Jimmy Sledge. The stated purpose of the meeting was

to inform Mr. Hafer and me about the organization and how it functions. However, no information significant to the investigation was obtained. Rather, the meeting appeared to be an effort by the organization to determine our level of knowledge concerning the investigation.

After the meeting with the executives, Mr. Hafer and I began examining the inpatient records of the Medicaid recipients residing at the DePelchin Faith Home. Susan Blair obtained the medical records for the Medicaid recipients billed for during December 1987. Wile comparing these records to the recipient histories, Investigator Hafer and I found evidence of some services being provided to the recipients. However, the services that were listed in the medical records were not indicated of the services listed on the claims. The medical records indicated only weekly group therapy sessions by non-supervised social workers and psychologists, as well as a few other non-covered services. The services listed on the claims all indicate direct psychotherapy by Dr. Beltangady three times per week. Mr. Hafer and I photocopied all documents provided to us in reference to the thirty-one paid claims, as it pertained to any treatment actually received by those recipients during December 1987 (Exhibit 12 - 42).

While examining these records, we discovered a total of fifty services billed that could not have been provided to three different recipients, because the recipients had been discharged from DePelchin Children's Center prior toe December 1987: Garcia discharged on 10/19/87 (Exhibit 19); Dean discharged 09/04/87 (Exhibit 15); and Bates discharged 11/24/87 (Exhibit 14). Another recipient who was discharged on December 15, 1987

was listed as receiving services after that date; Dolan (Exhibit 17). Nevertheless, DePelchin Children's Center sent in claims stating that services had been provided to these four recipients through December 31, 1987. For the month of December 1987 a total of thirty-two claims were filed. Thirty-one were paid, encompassing a total of 434 services which came to $16,095.51 (Attachment A. Once again, the explanation of services attachments to all the claims were photocopies of the same list of services (Exhibit 8).

After examining and copying records, Investigator Hafer and I met with Dr. Robert McKelvey. Mr. Sledge was also present during the interview. Dr. McKelvey became the Medical Director at DePelchin Children's Center subsequent to Dr. Beltangady's serving in that capacity. Dr. McKelvey stated that he did not examine the contents of Medicaid claims. Dr. McKelvery stated that he had nothing to do with Medicaid billing procedures for submitting claims. He simply signed the claims brought to him by Larry Cash's business office (Exhibit 43).

Texas Medicaid regulations provide that all claim forms must be signed by the provider or his/her authorized representative. Dr. McKelvey was neither a Medicaid provider nor an authorized representative of the provider group. Additionally, the provider's signature certifies that the information contained on the claim form is true and accurate, and that he is aware that any false claims may be prosecuted under applicable federal and state laws.

Mr. Hafer and I then interviewed Larry G. Cash. Mr. Sledge was present again. Mr. Cash stated that he had not been involved in setting up the Medicaid billing

procedures, but that he merely followed the same process that had been set up by Mark Rhoads. Mr. Cash referred several times to the term "bill averaging". Also, he referred to a "formula" that was utilized to determine what was billed. He would not state, however, what factors the formula contained. Mr. Cash did state that he was familiar with the Medicaid Provider Procedures Manual. Mr. Cash stated that on at least one occasion he had spoken with Richard McMahan, an NHIC Representative, but the situation with bill averaging was never discussed. Mr. Cash also stated that when Valerie Cormier-Bergenon became the NHIC Representative for DePelchin Children's Center he met with her on only one occasion, but he did not recall when or why. Mr. Cash was asked about the four discharged recipients for whom DePelchin Children's Center billed during December 1987. Mr. Cash stated that it was a "clerical error" (Exhibit 44).

Next Mr. Hafer and I met with Mark Rhoads, the former Business Manager for DePelchin Children's Center. Mark Rhoads came to DePelchin Children's Center to speak with us at Mr. Cash's request. Mr. Rhoads advised us that Dr. Beltangady, Mr. Barker, and Ms. Marsha Herderson were involved with him in procuring the provider status for the physician group and that these people were also respondible for designing the "formula" by which Medicaid would be billed. Mr. Rhoads was asked whether he would write down the "formula" that was utilized. He declined, stating that he didn't remember exactly what the "formula" was. As previously mentioned, Robert Barker denied knowledge of the "formula" (Exhibit 11). Dr. Beltangady also denied knowledge of the "formula", as well as the "bill averaging" procedure (Exhibit 11 & 48). Marsha

Henderson told us she was not permitted to participate in the third party billing process, or any discussions pertaining to the formula or bill averaging (Exhibit 50).

In the Spring of 1982, Mr. Rhoads trained Mr. Cash as to how the third party billing was set up. Mr. Rhoads did state that Mr. McMahan of NHIC was never informed of the "formula" or the "bill averaging" technique used to bill Medicaid (Exhibit 45).

On April 25, 1988 Mr. Hafer and I interviewed Valerie Cormier-Bergenon, the current NHIC Representative for DePelchin Children's Center. Ms. Bergenon stated that the only person from DePelchin Children's Center that she had ever met with was Larry Cash. She reported that Mr. Cash did attend NHIC Workshops on Medicaid billing and never gave the impression that he did not understand the procedures. Ms. Bergenon was not aware of DePelchin Children's Center's averaging procedure (Exhibit 46).

Then Mr. Hafer and I met with Richard L. McMahan, the first NHIC Provider Representative to meet with associates of DePelchin Children's Center. The only person that Mr. McMahan could remember meeting with was Larry Cash. Mr. McMahan did inform us that after our visit to DePelchin Children's Center, Mr. Cash had called him and asked Mr. McMahan whether he could recall any conversation regarding Medicaid services (Exhibit 47).

On May 6, 1988 Mr. Hafer and I talked with Dr. Beltangady at her current place of employment, Institute of Living, 400 Washington, Hartford, Connecticut. Dr. Beltangady stated that she left DePelchin Children's Center on August 31, 1984. She also stated that while

she was there she never received any monies of any kind from NHIC. Mr. Beltangady was on salary as a part-time employee, and after her resignation from DePelchin Children's Center never received any type of financial compensation from DePelchin for any reason.

Dr. Beltangady informed us that Marsha Henderson and Robert Barker were responsible for setting up the Medicaid procedures and processing the billings. Dr. Beltangady stated that when the Medicaid claims were sent to her, she never reviewed or corrected them. She simply signed them as they were brought to her. As such, she stated she was not aware of the billing "formula" or the "bill averaging".

Dr. Beltangady also stated that she was not aware the DePelchin Children's Center had continued to use her Medicaid provider number after she left their employ. Dr. Beltangady had made no provision to cancel her Texas Medicaid provider number. She explained that she would hold, on the average, one hour of individual psychotherapy and one hour of group psychotherapy per child per week, but not with other physicians' patients. She also stated that all other therapy would be performed by social workers without physician supervision (Exhibit 48).

On May 17, 1988 I interviewed Marsha Hoobler (Henderson) by telephone at her place of employment in Atlanta, Georgia. Ms. Hoobler related that she had not been privileged to information pertaining to third party billing. She was told to "leave it alone" by Mr. Robert Barker.

After the initial interview with Ms. Hoobler, she contacted Investigator Hafer on two other occasions, via

telephone, and related other information to him (Exhibit 50). Ms. Hoobler informed Mr. Hafer that a consultant had been hired by DePelchin Children's Center to assist them in obtaining their JCAH accreditation. The consultant was Dr. Carl Pfeifer from San Antonio, Texas.

On May 23, 1988 Investigator Hafer and I met with Dr. Pheifer at the Southwest Neuropsychiatric Institute at 8535 Tom Slick Drive, San Antonio, Texas. Dr. Pfeifer advised us that he was called in to assist DePelchin Children's Center with the JCAH accreditation but not to help set up the third party billing. (Exhibit 51).

On May 27, 1988 at approximately 8:15 a.m. Investigator Charles Hafer interviewed Paula J. Hayman by telephone. Ms. Hayman was the Assistant Director for Residential Services at DePelchin Children's Center. When Ms. Hayman was contacted by Mr. Hafer she stated that it was "about time" someone looked into the working of DePelchin. Ms. Hayman stated that the medical records were a problem as far as billing was concerned. This was brought to the attention of Dr. McKelvey by Ms. Hayman on several occasions; however, Dr. McKelvey did nothing to see that problems were corrected. Ms. Hayman did attend several meetings with Dr. McKelvey, Mark Rhoads, Robert Barker and others to discuss methods to maximize funding and to determine "rate increases" (Exhibit 52).

Information from 1099's for the years 1982 through 1988 was obtained showing that DePelchin Children's Center (Group Number Z000PM923) had only one individual provider listed as having performed any service: Dr. Shamal Beltangady, P08876271. The

claims and income information recorded since the enrollment date of January 21, 1982 is broken down as follows:

Year	Amount	Number of Claims
1982	$ 38,878.19	99
1983	$ 50,359.10	122
1984	$ 73,126.49	135
1985	$106,583.48	236
1986	$121,125.26	306
1987	-0-	-0-
1988	$ 16,090.51	32

*(paid 04/15/88 for services dated December 1987)

In September 1986 the "spell of illness" regulation became effective and the NHIC bulleting was released explaining "spell of illness". Larry Cash stated during an interview that he had interpreted the regulation to say that if a patient was considered an "inpatient", DePelchin Children's Center could bill for no more than thirty days. It is our belief that this regulation caused DePelchin Children's Center to suspend their billing practices until December 1987.

Upon examination of provider documentation, it was discovered that during December 1987 no active Medicaid providers in the Medicaid program were even on staff at DePelchin Children's Center. Therefore, Medicaid funds obtained from NHIC, as a result of the filing of Medicaid claims for December 1987, were obtained fraudulently. The following evidence summarizes the fraudulent scheme:

1. Dr. Beltangady was listed as the providing physician after she left the employ of DePelchin Children's Center;

2. There were no Medicaid providers at the facility to provide the services billed to Medicaid;

3. All claims were "bill averaged", instead of actual, as required by state regulation;

4. Fifty of the services listed for four recipients could not have been provided at all because the recipients already had been discharged;

5. Medical records did not substantiate the claims for services rendered;

6. Dr. McKelvey, who signed the claims, was not authorized to do so;

7. Witness statements indicate knowledge of the scheme on the part of all three named suspects.

According to 1099 information from January 21, 1982 to the present, DePelchin Children's Center has filed 930 claims and received $406,168.00. Exception is taken to the entire amount for the following reasons;

1. Claims were submitted based upon an illegal "bill averaging" concept not indicative of what services were actually performed;

2. Services that were provided were performed by someone other than an authorized Medicaid provider (in most instances psychologists and/or social workers);

3. Witness statements indicate knowledge of and participation in either the development or the furtherance of the billing scheme on the part of all three suspects.

IV. ATTORNEY RECOMMENDATION

Recommendation

The investigation of this Medicaid provider has revealed the existence of a fraudulent billing scheme utilizing Dr. Shamal Beltangady's Medicaid provider number without her consent or knowledge. The scheme involves a bill averaging formula resulting in billing for services not rendered. The investigation has identified nine hundred thirty claims for services not provided, totallling an overpayment of $406,168.00.

Evidence gathered by Investigator Harkey will support criminal prosecution, as well as administrative sanction. Criminal prosecution is appropriate under both federal and state fraud and theft statutes. Criminal prosecution is appropriate as to both the corporate entity and the individuals involved. Administrative action is appropriate under the Texas Administrative Code (TAC), the Civil Monetary Penalties Law (CMPL), and the False Claims Act (FCA).

Analysis of witness statements and existing documentation indicates fraudulent billing scheme was developed, initiated and conducted by high managerial agents of the corporate entity, in behalf of the corporation, and within the scope of their employment. The evidence

reveals that the Business Director, Larry Cash, prepared or directed the preparation of false claims. The Medical Director, Dr. Robert McKelvey, signed these false claims. The Medical Director, Dr. Robert McKelvey, signed these false claims knowing he was not an authorized Medicaid provider. The Executive Director, Robert Barker, directed and authorized the development, initiation and conduct of the fraudulent scheme carried out by the business and medical directors.

I recommend this case be presented for criminal prosecution to the Harris County Criminal District Attorney's Office. I also recommend this report be forwarded to the Office of Inspector General for consideration

of application of CHPL and FCA, and to the Texas Department of Human Services (TDHS) for administrative sanction.

Analysis

This section pertains to both criminal prosecution and administrative sanction. Theories of criminal prosecution, together with a discussion of evidence supporting each theory will be presented. Administrative violations will be considered and discussed in cursory fashion.

Criminal Prosecution

The evidence compiled by this investigation reveals a third party (Medicaid) billing scheme designed, implemented and conducted by high

managerial agents of the DePelchin Children's Center corporation. These high managerial agents, made up or the executive director, the business director and the medical director, in designing, implementing and executing this scheme, acted within the scope of their employment and in behalf of the corporation. The corporation thus becomes criminally responsible for the conduct of these individuals. Notwithstanding corporate criminal liability, these individuals remain criminally responsible for their own conduct just as if these crimes had been committed in their own behalf.

The fraudulent scheme uncovered involves billing for services which were never actually provided. The claim forms submitted contained a Medicaid provider number belonging to a physician who had not been employed by the company for several years. The signature on the claims was not that of an authorized Medicaid provider. And certain Medicaid recipients had even been discharged from the facility prior to the dates of services billed to Medicaid.

To varying degrees, the testimonial and documentary evidence collected is sufficient to link each suspect to knowledge and participation in the fraudulent scheme. Moreover, their job functions dictate some knowledge and participation, both jointly and separately, as a natural consequence of their employment. Nevertheless, because of the understandable unwillingness of the suspects to divulge more complete details, the organizational flow of paper in the claims preparation process was not

fully developed. Therefore, it is important to note that this information must be more fully developed by means of grand jury investigation of employees of the DePelchin Children's Center, Inc. The employees of the company were not cooperative to the extent that they were questioned regarding the actual processing and preparation of Medicaid claims, the persons specifically involved therein, and the knowledge of each of those persons regarding the development, initiation and furtherance of the billing process.

Theft, P.C. Sec. 31.03, V.T.C.A.

The evidence compiled by this investigation reveals a third party billing scheme designed and implemented to unlawfully appropriate money from the Medicaid program, without the effective consent of the National Heritage Insurance Company (NHIC).

The consent here is rendered ineffective by virtue of DePelchin's failure to comply with several Medicaid regulations, to-wit:

1) the service must be actually provided;
2) the service must be provided by an authorized Medicaid provider; and
3) the claim form must not contain any false information.

Although absent a confession, intent to deprive must be inferred from the circumstances, the overwhelming evidence of the falsity of the claims is sufficient to prove the intent to defraud element in this case. The boldness

of the scheme and its complete contradiction of Medicaid regulations suggests no other hypotheses.

The appropriation of property is easily shown through proof of payment by NHIC. The custodian of records can identify each claim and correlate it with each payment.

Securing Execution of Document by Deception, P.C. Sec. 32.46, V.T.C.A.

The evidence presented by this investigation unveils a billing scheme purposefully designed and implemented to secure the execution of payment checks by NHIC to DePelchin, thereby affecting the pecuniary interest of NHIC.

The scheme is so deceptive in its construction, that it cannot reasonably be viewed as anything other than an intentional plan to defraud the Medicaid program. Claims were submitted according to a formula, for services which were not provided, using the Medicaid provider number of a physician who was not even employed by the company. Furthermore, the claim was signed by a person not authorized as a Medicard provider, nor even a member of the Medicaid authorized "group".

Tempering with Governmental record, P.C. Sec. 37.10, V.T.C.A.

The evidence uncovered by this investigation brings to light a billing scheme conceived to defraud, the core of which requires the submission of false governmental records.

It is important to understand at this juncture that the health insurance claim forms, submitted by DePelchin to NHIC, are "governmental records" by reason of the fact that they are required by law to be kept for information of government. This means that they are not a governmental record "per se" at the time of falsification, but they become governmental records by their making, presentation and use by DePelchin for the purpose of obtaining Medicaid money.

The facts herein reveal a complex arrangement between the executive director, the business director and the medical director to defraud the Medicaid program by the intentional and knowing falsification and use of documents intended to be taken as governmental records. The executive director, bearing criminal responsibility for the conduct of the business and medical directors which he supervised, participated in the conception and development of the fraudulent billing scheme. Further, he authorized implementation of the scheme by the business director knowing that the "formula" required the business director to include false information; and knowing that the medical director, who was not an authorized Medicaid provider, had to sign the false claims prior to their submission.

The business director was responsible for preparation of the Medicaid claims, and supervision of clerical staff whose duties involved the preparation of the Medicaid claims. It is highly unlikely that the clerical staff took it upon themselves, without direction from their supervisor, to reproduce identical copies of the explanation of services for attachment to each claim. It is very telling if the medical director is to be taken at his word, that the explanation of services was not attached to the claim form until after he signed it.

The medical director, knowing he was not a Medicaid provider, signed each false claim. Moreover, there is some evidence by a previous employee that the medical director not only participated in meetings concerning the billing scheme, but that he was told of the problem of billing for Medicaid services not being provided.

Administrative Sanction

Texas Administrative Code
The evidence reveals TDHS rules violations of 40 T.A.C. Sec. 79.2105 (1), (2), (3), (6), (11), (21), (22), (24), and (26):

> (1), (2), and (3) can be proved by the testimony of Shamal Beltangady regarding the unauthorized use of her Medicaid provider number by DePelchin Children's Center, and her testimony that she never provided the services for which DePelchin billed Medicaid.
>
> (6) and (11) can be proved by evidence of DePelchin billing for services not provided, to-wit: billing for Monday, Wednesday and Thursday psychotherapy sessions regardless of whether they were provided, and submitting claims with identical photocopied explanation of services. These violations may also be proved by evidence of an unauthorized signature on the claims.
>
> (21), (22) (23), (24), and (26) can be proved by both evidence of DePelchin's false billing scheme together with the patient medical records which fail to support the services claimed.

Each such violation would, standing alone, allow for total recoupment of all overpayments identified by this investigation.

Civil Monetary Penalties Law and False Claims Act

The facts presented herein will justify the imposition of CMPL, 42 U.S.C. Sec. 231. The elements of proof required for either action are substantially similar to those indicated and discussed under both the criminal statutes cited and the administrative code regulations cited. The evidence necessary to a successful proceeding is highlighted in the discussions of the criminal and administrative violations set out above.

Venue

Venue is appropriate for state prosecution in either Harris County, Texas, where the falsification took place, or Travis County, Texas, where the claims were filed and paid.

Venue is appropriate for federal prosecution in either the Southern District of Texas, where the falsification took place, or the Western District of Texas, where the claims were filed and paid.

The investigative findings herein, together with this recommendation, address only the events, claims and services actually reviewed (included as an exhibit hereto), and, excepting statistical projections, if any, do not address any other events, claims or services, or other aspects of this provider's participation in the Texas Medical Assistance program.

V. RECAPITULATION

A. Number of incorrect claims/entries: 930

B. Amount of overpayments/ misappropriations/ adjustments: $406,163.03

C. State criminal limitation runs on earliest claim: 01/01/84

D. Federal criminal limitation runs on earliest claim: 01/01/86

VI. ATTACHMENTS

A. Schedule of Incorrect Claims (Attachment A for December 1987 only)

B. __ List of Report Exhibits

C. List of Witnesses

Investigator: /s/ Bruce w. Harkey on (illegible)
Bruce W. Harkey

Supervisor: /s/ John E. Bottoms on June 22, 1988
John E. Bottoms

Attorney: /s/ Thomas H. Vasquez on June 22, 1988

Disposition: _____ on _____
06/21/88
emm/lb